

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

Case No. 2010030832

JESSE W.,

Claimant,

vs.

SAN GABRIEL/POMONA REGIONAL
CENTER,

Service Agency.

DECISION

The hearing in the above-captioned matter was held on June 29, 2011, at Pomona, California, before Joseph D. Montoya, Administrative Law Judge (ALJ), Office of Administrative Hearings. San Gabriel/Pomona Regional Center (Service Agency) was represented by Daniela Martinez, Fair Hearing Manager. Claimant Jesse W. was not in attendance, but was represented by his legal guardian, Kathleen M.¹

Evidence was received and argument was heard at the hearing, but the record was held open so that Claimant would have an opportunity to submit further documentary evidence, and so the Service Agency might respond to any such evidence.

No documents were received from Claimant by the due date for his submission, July 11, 2011. The ALJ held the record open for an additional period to account for the vagaries of mail delivery, but with no submission having been made by Claimant, the matter was deemed submitted on July 15, 2011.

¹ Initials are used for the family surname to protect Claimant's privacy.

ISSUE PRESENTED

Should Claimant, who was made eligible for benefits under the Lanterman Act in 2006, based on a diagnosis of “unspecified” Mental Retardation, lose his eligibility on the grounds that his original diagnosis was clearly erroneous?

FACTUAL FINDINGS

The Parties, and Jurisdiction:

1. Claimant is a seven-year-old boy² who has been eligible to receive services under the Lanterman Developmental Disabilities Services Act (Lanterman Act), California Welfare and Institutions Code, section 4500 et seq.³ Claimant was made eligible based on a diagnosis of Mental Retardation. (Ex. 2.)

2. On January 13, 2010, the Service Agency wrote to Claimant’s Guardian and informed her that Claimant was no longer considered to be eligible for services, effective February 12, 2010. The letter, titled “Notice of Termination of Eligibility” stated that a Service Agency interdisciplinary team had concluded that the original diagnosis, which made Claimant eligible, was clearly erroneous, and that the boy did not suffer from Mental Retardation. (Ex. 10. pp. 1-2.) The letter was accompanied by a Notice of Proposed Action (NOPA), which stated that the Service Agency proposed to terminate services. Thereafter, Claimant’s Guardian filed a Fair Hearing Request, dated January 21, 2010.⁴ All jurisdictional requirements have been met.

3. Available records, and testimony by Claimant’s Guardian, indicate that Claimant suffered prenatal exposure to drugs and alcohol, in copious amounts. Claimant exhibited global developmental delays and problems early in life. Reports generated by Claimant’s school district show delays at approximately two years of age, in the areas of cognition, language, gross motor, social, and self-help skills. (Ex. 1, p. 2.)

4. The Service Agency deemed Claimant eligible for services in June 2006, shortly before his third birthday. At that time the Service Agency’s Eligibility Team met, and found that he suffered from Mental Retardation, unspecified, and that Claimant was substantially handicapped by his condition. In coming to that conclusion, the Eligibility Team relied on a June 2006 psychological evaluation. The Eligibility Team made various

² Claimant will turn eight on August 15, 2011.

³ All statutory references are to the Welfare and Institutions Code, unless otherwise noted.

⁴ The NOPA and Fair Hearing Request were not offered in evidence. The ALJ takes official notice of copies of those documents contained in the OAH file for this case.

recommendations regarding services, and also stated that Claimants' cognitive levels should be re-evaluated at age five to six years. (Ex. 2, p. 2.)

5. The Service Agency began providing services to Claimant following the finding of eligibility. He also received special education services from his school district. The school district had determined that he is eligible for services based on a learning disorder. (Ex. 6.)

6. According to Claimant's August 2009 Individual Program Plan (IPP), Claimant was then receiving behavioral interventions. (Ex. 5, p. 11.) The IPP discloses a number of problem areas pertaining to speech, behavior, and socialization.

7. (A) On or about September 9, 2009, Deborah Langenbacher, Ph.D., the Service Agency's staff psychologist, reviewed a psycho-educational evaluation that had been performed by Claimant's school district in May 2009. That psycho-educational evaluation was not offered in evidence. However, Dr. Langenbacher states in a note to Claimant's file that the school district evaluation indicated "low borderline cognitive (SS [standard score] of 71 on CAS). There are some areas where he is performing at a higher level (e.g., memory, domestic skills). According to the SIB-R there are delays in the area of self care. This [the district's] report indicates eligibility for special education due to LD." (Ex. 6.)

(B) Dr. Langenbacher recommended re-evaluation by the Service Agency, with a standardized IQ test, to "clarify his diagnosis and continued RC eligibility." (Ex. 6.) She noted that because Claimant was African-American, the school district had not used a standard intelligence test.

8. On September 22, 2009, Claimant was assessed by Edward G. Frey, Ph.D., a licensed clinical psychologist. Dr. Frey administered an IQ test, the Wechsler Preschool and Primary Scale of Intelligence-III (WPPSI-III). He also administered the Vineland Adaptive Behavior Scales—II (Vineland).

9. (A) Claimant's full scale IQ score was a 78, based on a verbal IQ score of 81; a performance IQ score of 79, and a processing speed quotient of 83. (Ex. 7, p. 6.) This placed Claimant in the mid to upper-end of the borderline range. (*Id.*, p. 3.) Dr. Frey used eight of the fourteen subtests; there is no explanation of why some of the other subtests were not used. In any event, the scores on the subtests ranged from a high of eight, to a low of four, with five of the eight subtest scores being seven or lower. (*Id.*, p. 6.)

(B) The results of the Vineland, designed to test adaptive behavior, were less favorable than the IQ test results. Claimant's adaptive behavior composite, at 65, was clearly deficient, as this is more than two standard deviations below the mean. The domain scores were deficient as well. The highest, socialization, was a 75, the next highest, motor skills, was a 70. The scores for communication and daily living skills were 65 and 64, respectively. (Ex. 7, p. 6.)

10. (A) Dr. Frey diagnosed Claimant as not suffering from mental retardation, but rather as having Borderline Intellectual Functioning. (Ex. 7, p. 4.) He opined that Claimant is possibly suffering from Attention Deficit/Hyperactivity Disorder (ADHD) and psychosis, as Claimant's Guardian told Dr. Frey that Claimant sometimes spoke to people who were not present.

(B) Dr. Frey stated some "suspicions" in his report. He suspects that Claimant may have higher potential than mid to high borderline intellectual functioning. (Ex. 7, p. 3.) He suspects that the adaptive deficits shown by the Vineland are "do (sic) in part to his learning disability are also reflective of significant mental health issues as well as deficits in attention and concentration." (*Id.*, p. 4.)

(C) Dr. Frey stated that Claimant's adaptive deficits "appear to be lowered due to a combination of numerous factors." (Ex. 7, p. 4.) He did not find it "appropriate to view Jessie (sic) as a child with mental retardation. He appears to be displaying significant behavioral and possibly psychiatric symptomatology. The possibility of ADHD needs to be ruled out as well as the possibility that Jessie is experiencing auditory hallucinations." (*Id.*)

11. Dr. Frey's report, totaling six pages, including the summary of the test scores, indicates that he reviewed the school district evaluation report, generated in May 2009. However, that is the only report discussed under the heading "previous testing."

12. Claimant's Guardian testified that on the recommendation of the child's social worker, she took him to the University of Southern California (USC) for evaluation. Although she did not have a written report with her at the hearing, she testified credibly that USC has diagnosed the child with ADHD and Fetal Alcohol Syndrome. Another expert, Dr. Habbstead, is concerned that Claimant has psychosis or some other psychiatric disorder.

13. (A) The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision, published by the American Psychiatric Association (hereafter DSM), is the most widely accepted source of diagnostic criteria for developmental disorders such as Mental Retardation and Autism. It teaches that the essential features of Mental Retardation are a significantly subaverage general intellectual functioning that is accompanied by significant limitations in adaptive functioning, in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. (DSM, p. 41.) "Significantly subaverage intelligence" is defined as an IQ of about 70 or below; there is a possible error of measurement of approximately five points, depending on the IQ test used. (*Id.*) Put another way, "significantly subaverage" translates to IQ scores falling in the second percentile. It must also be noted that for a person to receive a diagnosis of mental retardation, the onset must occur before age 18.

(B) As noted in the DSM, “when there is a marked discrepancy across verbal and performance scores, averaging to obtain a full-scale IQ can be misleading.” (DSM, p. 42.) No such discrepancy having been found here, it appears that it was appropriate for Dr. Frey to calculate a full scale IQ score for Claimant.

(C) The DSM also teaches that

Impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation. *Adaptive functioning* refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting. Adaptive functioning may be influenced by various factors, including education, motivation, personality characteristics, social and vocational opportunities, and the mental disorders and general medical conditions that may coexist with Mental Retardation. Problems in adaptation are more likely to improve with remedial efforts than is the cognitive IQ, which tends to remain a more stable attribute. (DSM, p. 42.)

14. It can not be found that a comprehensive reassessment of whether or not Claimant has a developmental disability was made. Instead, a basic psychological assessment was performed, but that was primarily the administration of two tests. It does not appear that Dr. Frey reviewed any other reports regarding Claimant, including whatever reports led to eligibility. It does not appear that psychiatric problems were ruled out. No analysis was made of how the school district could find a learning disorder in a child it assessed as having an IQ of approximately 71. No analysis appears to have been made as to whether Claimant is eligible under the fifth category.

LEGAL CONCLUSIONS

1. Jurisdiction was established to proceed in this matter, pursuant to section 4710 et seq., based on Factual Findings 1 and 2.

2. The Service Agency bears the burden of proving that Claimant’s diagnosis, upon which his eligibility was based, was “clearly erroneous,” based on section 4643.5, subdivision (b), and Evidence Code section 500.

3. The Lanterman Act, at section 4512, subdivision (a), defines developmental disabilities as follows:

“Developmental disability” means a disability which originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual . . . this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

This latter category is commonly known as “the fifth category.”

4. (A) Regulations developed by the Department of Developmental Services (DDS), pertinent to this case, are found in Title 17 of the California Code of Regulations (CCR).⁵ At CCR section 54000 a further definition of “developmental disability” is found which mirrors section 4512, subdivision (a), of the Lanterman Act.

(B) Under CCR section 54000, subdivision (c), some conditions are excluded. The excluded conditions are:

(1) Solely psychiatric disorders where there is impaired intellectual or social functioning which originated as a result of the psychiatric disorder or treatment given for such a disorder. Such psychiatric disorders include psycho-social deprivation and/or psychosis, severe neurosis or personality disorders even where social and intellectual functioning have become seriously impaired as an integral manifestation of the disorder.

(2) Solely learning disabilities. A learning disability is a condition which manifests as a significant discrepancy between estimated cognitive potential and actual level of educational performance and which is not a result of generalized mental retardation, educational or psycho-social deprivation, psychiatric disorder, or sensory loss.

(3) Solely physical in nature. These conditions include congenital anomalies or conditions acquired through disease, accident, or faulty development which are not associated with a neurological impairment that results in a need for treatment similar to that required for mental retardation.

⁵ All references to the CCR are to title 17.

5. Section 4643.5, subdivision (b), provides that once any regional center has determined that a person has a developmental disability, they “shall remain eligible for services from regional centers unless a regional center, following a comprehensive reassessment, concludes that the original determination that a person has a developmental disability is clearly erroneous.”

6. (A) The Service Agency has not carried its burden of proving that the original determination that Claimant has a developmental disability was clearly erroneous, based on Legal Conclusion 5, and Factual Findings 3 through 14. In part this is because it was not established that a comprehensive reassessment was performed.

(B) Although section 4643.5 does not define comprehensive reassessment, the Lanterman Act does speak to assessments as potentially including collection and review of historical diagnostic data, provision and procurement of tests and evaluations. (See § 4643, subd (a) & (b).)

(C) It does not appear that Claimant was assessed to determine if he has a developmental disability based on the fifth category. Given that “impairments in adaptive functioning, rather than a low IQ, are usually the presenting symptoms in individuals with Mental Retardation,”⁶ and given that Claimant’s overall adaptive function tested as clearly deficient (Factual Finding 9(B)),⁷ he may be similar to a person with mental retardation, or need services similar to those provided to a person with mental retardation.

(D) While there is evidence, or suspicion, that Claimant suffers from a learning disability, psychiatric problems, and ADHD, that alone may not be a bar under CCR section 54000, subdivision (c), because his condition would not be “solely” the result of a psychiatric disorder or a learning disorder.

7. The ruling in favor of Claimant is without prejudice to the Service Agency renewing its efforts after further assessment.

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⁶ From the DSM, p. 42, further quoted in Factual Finding 13(C).

⁷ The composite score of 65 is two standard deviations below the mean. Three of the subtest scores were also two standard deviations below the mean. The high score, 75 for socialization, is hardly a stellar score.

ORDER

The appeal of Claimant Jesse W. is hereby sustained, and he shall remain eligible for services.

Dated: July 28, 2011

Joseph D. Montoya
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION IN THIS MATTER, AND BOTH PARTIES ARE BOUND BY IT. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN NINETY (90) DAYS OF THIS DECISION.